LOW HAI SEE

v.

MINISTER FOR HOME AFFAIRS, MALAYSIA & ANOR.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HASHIM YEOP SANI CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
GUNN CHIT TUAN SCJ
MOHD. JEMURI SERJAN SCJ
[SC CRIMINAL APPEAL NOS. 05-9-90; 05-27-90; 05-30-90; 05-24-90; 05-25-90, 05-19-90; 05-20-90; 05-21-90; 05-22-90; 05-23-90; 05-31-90]
3 MAY 1990

CRIMINAL PROCEDURE: *Section 11B Dangerous Drugs (Special Preventive Measures) Act 1985 - Habeas corpus proceedings - Detention order under s. 6(1) extension order under s. 11A - Revocation order under s. 11B(1) by Minister of Home Affairs - Fresh order under s. 11B(2).*

All three sets of appeals concern the interpretation of s. 11B of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). In each case the appellant was either detained pursuant to an order under s. 6(1) of the Act or detained pursuant to an extension order under s. 11A of the Act which order or extension order was revoked by the Deputy Minister of Home Affairs under s. 11B(1) of the Act and who then issued a fresh order purporting to act in each case under s. 11B(2) of the Act.

Apart from the *habeas corpus* proceedings which resulted in the present appeals, there were many other applications for orders of *habeas corpus* made before various High Court Judges. In every one of those proceedings s. 11B of the Act was considered in depth.

The issue in these cases is not so much the power to revoke as such but whether the Minister has in law the power to issue a fresh detention order under s. 11B(2) read with s. 6(1) of the Act and if so, in what manner.

Held:

[1] The use of the words "any order" in s. 11B(1) would seem to embrace all orders valid or invalid.

[2] Section 11B(2) is in the nature of a saving provision in which there are two limbs. The first limb seeks to preserve the validity of the Minister's order or direction and any act done under or in relation to the order or direction before its revocation. The second limb is to seek to preserve the power of the Minister "to make a fresh order" or "to give a fresh direction".

[3] Section 11B is intended to confer on the Minister the power, among other things, to revoke any order under s. 6 and any direction under s. 11A of the Act. However if the Minister revokes a detention order then the saving provision wants to make it clear that the revocation by itself will not prejudice the exercise of the Minister's power to make a fresh detention order under s. 6(1) of the Act or any other direction under the Act. However if he proposes to make an order under s. 6(1) then he must abide by the provision of s. 6(1)(a) and (b) of the Act all over again and not merely to invoke the saving provision of s. 11B. This is because s. 11B(1) does not speak of any fresh order and s. 11B(2) does not provide for any procedure or limit of a fresh order.

[4] Therefore there was no power for the Minister to make a fresh order under s. 6(1) of the Act relying solely on a saving provision of s. 11B of the Act.

[5] The fundamental principle involved in these cases, is that the power to detain a person without trial cannot be exercised by inference. The power must be express, clear and unequivocal and where detention law and the liberty of the individuals are concerned this is the most correct approach for the Courts to apply.

[Appeals allowed.]

Cases referred to:

Tan Hoon Seng v. Minister of Home Affairs [1990] 1 CLJ (Rep) 271
H. Das v. District Magistrate Cuttack & Anor. [1969] AIR SC 43
B. Hembram & Ors. v. State of West Bengal & Ors. [1974] AIR SC 2279
Re Tan Boon Liat @ Allen & Anor. [1977] 2 MLJ 114
PP v. Koh Yoke Koon [1988] 1 CLJ (Rep) 269

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1)(a), (b), 3(3), 5(4), 6(1), 6A(2), 6(3), 11A, 11B(1), (2)
Internal Security Act 1960, s. 81(3)

For the appellant - Karpal Singh (Gurbachan Singh with him) in Cr. Appeal No. 05-9-90; M/s. Karpal Singh & Co.
For the appellant - Tan Hock Chuan in Cr. Appeal No. 05-27-90; M/s. Kam Woon Wah & Co.
For the appellant - Gooi Hock Seng in Cr. Appeal No. 05-30-90; M/s. Shan & Gooi
For the appellants - Darshan Singh in Cr. Appeal Nos. 05-24-90, 05-20-90, 05-21-90, 05-22-90, 05-23-90; M/s. Darshan Singh & Co.
For the appellant - V. Shanmugam in Cr. Appeal No. 05-19-90; M/s. Shanmugam & Co.
For the respondents in all appeals - Balia Yusof bin Hj. Wahi, DPP (Noorbahri bin Baharuddin, DPP with him)

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

All three sets of appeals concern the interpretation of s. 11B of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). In each case the appellant was either detained pursuant to an order under s. 6(1) of the Act or detained pursuant to an extension order under s. 11A of the Act which order or extension order was revoked by the Deputy Minister of Home Affairs under s. 11B(1) of the Act and who then issued a fresh order purporting to act in each case under s. 11B(2) of the Act.

Apart from the *habeas corpus* proceedings which resulted in the present appeals, there were many other applications for orders of *habeas corpus* made before various High Court Judges. In every one of those proceedings s. 11B of the Act was considered in depth. The Judges were divided in their views.

The High Court, Penang (Dzaiddin J) in Penang High Court Criminal Application No. 44-69-89 granted orders of *habeas corpus* to five applicants holding that the Minister had no power to issue a fresh order of detention under s. 11B(2) of the Act. The Shah Alam High Court (Wan Yahya J) also granted the application for *habeas corpus* to an applicant in High Court Shah Alam Criminal Application No. 44-29-89 holding that s. 11B is not intended to empower the Minister to simultaneously revoke and issue a fresh order under s. 6(1) of the Act. The Alor Setar High Court (K.C. Vohrah J) granted a similar application in High Court Alor Setar Criminal Application No. 54-9-89 on the grounds that since the original detention order was

invalid there is no power to revoke or to give a fresh detention order. The Ipoh High Court (Ong See Seng JC) in High Court Ipoh Criminal Application No. 44(54) 37-89 refused the *habeas corpus* application of one of the present appellants holding that under s. 11B of the Act the Minister has power to revoke an invalid order but the learned Judicial Commissioner did not however decide on the question whether the Minister has power to issue a fresh order. However this same Judge in High Court Ipoh Criminal Application No. 44(54)9-89 granted an order of *habeas corpus* holding that the Minister has no power to issue a fresh order under s. 11B(2) of the Act. Talalla JC in High Court Muar Criminal Application No. 44-39-1989 and Edgar Joseph Jr. J in High Court Penang Criminal Application No. 44-7-90 refused *habeas corpus* applications to the respective applicants (among the present appellants) on the grounds that the Minister has power under s. 11B of the Act to revoke any order and to issue a fresh order in place thereof. Finally, Shankar J in High Court Shah Alam Selangor Criminal Application No. 44-32-89 granted an application for *habeas corpus* holding similar views as those of Wan Yahya J.

In the present appeals Counsel for the appellants led by Mr. Karpal Singh for appellant Poh Chin Kay, submitted two points of law common to all. Firstly it was their contention that if the original detention order under s. 6(1) of the Act was rendered invalid by virtue of *Tan Hoon Seng v. Minister of Home Affairs* [1990] 1 CLJ (Rep) 271, then there was nothing for the Minister to revoke or to replace under s. 11B(2) of the Act. The argument was that if an order for detention is in the first place invalid or *void ab initio* there is nothing to revoke. In other words, they say, the power of revocation presupposes that the original detention order was a valid order and since the original detention orders were void or invalid because of *Tan Hoon Seng*, then there cannot be a fresh order made to replace it. In short the power to revoke an order and to replace it with a fresh order can only be exercised when the original detention order is a valid order.

In our view this argument cannot stand close scrutiny. In the first place *Tan Hoon Seng* never referred to the original detention order there as void or invalid. It made no such declaration. Secondly the use of the words "any order" in s. 11B(1) would seem to embrace all orders valid or invalid. As Talalla JC said as long as a detention order is "extended" the Minister has the power to revoke it. Edgar Joseph Jr. J gave a short answer to this question by stating that the word "revocation" includes cancellation of all orders valid as well as invalid and cited two Indian cases - *H. Das v. District Magistrate Cuttack & Anor*. [1969] AIR SC 43 and *B. Hembram & Ors. v. State of West Bengal & Ors.* [1974] AIR SC 2279.

It is to be noted at once that what is really in issue here is not so much the power to revoke as such but whether the Minister has in law the power to issue a fresh detention order under s. 11B(2) read with s. 6(1) of the Act and if so, in what manner.

For convenience the provisions of s. 6(1) of the Act and s. 11B of the Act are reproduced below.

> Section 6(1). Whenever the Minister, after considering:
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> (a) the complete report of investigation submitted under subsection (3) of s. 3; and
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> (b) the report of the inquiry officer submitted under subsection (4) of s. 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years from the date of such order.
>
> Section 11B(1) Notwithstanding anything contained in this act, the Minister may at any time

> revoke any detention order made under subsection (1) of s. 6, or any restriction order made under subsection (3) of s. 6, or any suspended detention order, or any direction under subsection (1) of s. 11A for the extension of the duration of any such order, if he deems it just or fit to do so.
>
> (2) Any revocation under subsection (1) shall be without prejudice to the validity of the order or direction before its revocation or to anything done thereunder, or to the power of the Minister to make a fresh order or to give a fresh direction as is mentioned under subsection (1) in respect of the person against whom the order or direction which is revoked was made or given.

In our view Wan Yahya J correctly identified s. 11B(2) of the Act as a saving provision. Despite the fact that that subsection was enacted nearly three years after the enactment of subsection (1) of s. 11B (*vide* Act A707 which came into force on 15 July 1988) the language used in the subsection clearly shows it to be in the nature of a saving provision in which there are two limbs. The first limb seeks to preserve the validity of the Minister's order or direction and any act done under or in relation to the order or direction before its revocation. The second limb is to seek to preserve the power of the Minister "to make a fresh order" or "to give a fresh direction". It is the second limb which is vague and the cause of the present problem.

The fundamental question is this: can s. 11B(2) of the Act properly be regarded in law as a source of power for the Minister to issue a detention order part and separate from s. 6(1) of the Act. The learned Senior Federal Counsel contended that s. 11B(2) should be read together with s. 6(1) of the Act to give the power to the Minister.

It is important to note the use of the word "fresh" describing the order or direction under s. 11B(2). The word "fresh" would seem to indicate that a detention order or direction may be made **afresh**. Another thing to note in the second limb is the reference to order or direction "as is mentioned under subsection (1)" which can only mean:

(i) any of the three orders under s. 6 of the Act, and;

(ii) a direction under s. 11A of the Act.

It seems quite clear to us therefore that what is intended in s. 11B is to confer on the Minister the power, among other things, to revoke any order under s. 6 and any direction under s. 11A of the Act. However if the Minister revokes a detention order then the saving provision wants to make it clear and the revocation by itself will not prejudice the exercise of the Minister's power to make a fresh detention order under subsection (1) of s. 6 of the Act or any other direction under the Act. However if he proposes to make an order under subsection (1) of s. 6 then he must abide by the provisions of s. 6(1)(a) and (b) of the Act all over again and not merely to invoke the saving provision of s. 11B. This is because s. 11B(1) does not speak of any fresh order and s. 11B(2) does not provide for any procedure or limit of a fresh order. This interpretation is in fact fortified by the amendment recently passed by Parliament in Dangerous Drugs (Special Preventive Measures) Amendment Act 1990 (Act A766) which came into force a month ago on 3 April 1990, in particular the new s. 6A(2) which provides:

> No fresh detention order or fresh restriction order referred to in subsection (2) of s. 11B shall be invalid or inoperative by reason that no fresh report has been submitted under subsection (3) of s. 3 and subsection (4) of s. 5 or that that detention order or restriction order was made on the same ground as the previous detention order or restriction order.

We also note that a similar power to revoke or cancel an order or direction already exists in another legislation i.e., the Internal Security Act 1960 where s. 81(3) thereof reads:

> 81(3) Any order or regulation made or any direction or instruction given under this Act may at any time during its continuance be cancelled by the person empowered to make the order or regulation or to give the direction or instruction, but without prejudice to the previous validity thereof or to anything done thereunder or to the power of the person to make a fresh order or regulation or give a fresh direction or instruction under those provisions.

The Internal Security Act provision is certainly a better worded provision which makes it clear that what is preserved is the power to make a **fresh order** or regulation or give a fresh direction or instruction **under those provisions**.

Our conclusion is that in respect of all these appeals there was no power for the Minister to make a fresh order under subsection (1) of s. 6 of the Act relying solely on a saving provision of s. 11B of the Act.

The scenario has of course changed with the passing of the Amendment Act A766 especially the omnibus validation by s. 5 of that Act.

We are fully conscious of the Government's effort to combat the drug menace in this country. But there is a fundamental principle involved here. The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals are concerned this is the most correct approach for the Courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the Courts in dealing with detention law. The principle was emphasised in *Re: Tan Boon Liat @ Allen & Anor.* [1977] 2 MLJ 114 reiterated by this Court in *Public Prosecutor v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269 and *Tan Hoon Seng v. Minister of Home Affairs*.

Also found at [1990] 2 CLJ 4